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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 191

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES AND FARMER BROS. CO., a corporation, the real party in interest,

Petitioners,

vs.

GAY LILLEFLOREN, RUSSELL MARKS, L. L. SYLVANE, HOMER FORD and IRV MAGISEN,

Respondents.

On Writ of Certiorari to the Supreme Court of California.

BRIEF FOR PETITIONERS.

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES and FARMER BROS. CO., a corporation, the real party in interest,

Petitioners,

vs.

GAY LILLEFLOREN, RUSSELL MARKS, L. L. SYLVANE, HOMER FORD and IRV MAGISEN.

BRIEF FOR PETITIONERS.

Opinions Below.

The memorandum of opinion of the Court below, Superior Court of the State of California, in and for the County of Los Angeles, is in the Response of Farmer Bros. Co., Objections to Granting Review by the Supreme Court of California [R. 169]. The opinions in the Supreme Court of California [R. 215]; Dissenting Opinion [R. 216] are reported in 31 Advance California Reports, page 460, 180 P. 2d 265. The Opinion relied upon by the Supreme Court of California holding unconstitutional the law here involved, *In re Blaney* [R. 181], Dissenting Opinion [R. 199], is reported in 30 Advance California Reports, page 648; Dissenting Opinion, page 666 (184 P. 2d 892).

Jurisdiction.

The judgment of the Supreme Court of California was entered February 5, 1948 [R. 215]. It ordered that the judgments of the Superior Court be reversed as follows: "The judgments and orders of commitment in each of the above entitled cases are annulled and the petitioners are discharged." The constitutional issues here presented were urged in the Trial Court [R. 118, 107, 121], where the demurrers of Lillefloren and the others were overruled in the Court below. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended. Petition for a Writ of Certiorari was filed on August 2, 1948, and was granted on October 11, 1948.

Questions Presented.

Sections 1131-1136 of the Labor Code of California defines certain acts which are called hot cargo and secondary boycotts. Certain definitions are given and provision is made for injunctive relief and recovery of damages. The act in substance denounces any act, combination or agreement which directly or indirectly causes, induces, or compels a violation of the provisions of the act or inflicts any loss, injury or damage, and defines "hot cargo" and "secondary boycott."

The questions presented are:

1. Whether the act is so uncertain that a person does not know in advance whether its application to his conduct will be constitutional or unconstitutional, and whether it violates due process of law as protected by the Fourteenth Amendment to the Constitution, and abridges free speech as safeguarded by the First Amendment to the Constitution?

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2. Whether the denial by the Supreme Court of California to the petitioners of relief under the facts set forth in the complaint, deprives the petitioners in interest of the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution?

Statutes Involved.

The statutory provisions involved are Sections 1131-1136 of the Labor Code of California (Statutes 1941, Ch. 623, §1, p. 2079), adopted by referendum vote at a general election of the people of California November 3, 1942, subsequent to enactment by the legislature of California, Deering's California Code (Labor Code, Ch. 8, p. 60):

"CHAPTER 8

HOT CARGO AND SECONDARY BOYCOTTS

(Added by Stats. 1941, ch. 623, §1, p. 2079; adopted by referendum vote at general election of November 3, 1942.)

§1131. Declaration of unlawfulness.

§1132. Acts, etc., causing violation of chapter.

§1133. Injunctive relief: Recovery of damages.

§1134. Definitions.

§1135. Duration of statute.

§1136. Invalidity of provision or of application to particular person or circumstance.

§1131. Declaration of unlawfulness. The 'hot cargo' and 'secondary boycott' are hereby declared to be unlawful. (Added by Stats. 1941, ch. 623, §1, p. 2079.)

The statute by which this chapter was added further contained the following section:

§2. (Purposes of act.) This act is enacted for the purpose of preserving tranquility among the citizens of this commonwealth and to insure during this present critical period of National emergency and intensive armament the unobstructed production and distribution of the products of our factories and fields, for the continued protection and preservation of our democratic way of life and for the general welfare of the people of this State. (Stats. 1941, ch. 623, §2.)

Anno: See 12 McK. Dig. Labor, §22; 15 Cal. Jur. 578; 31 Am. Jur. 957 *et seq.*

§1132. Acts, etc., causing violation of chapter. Any act, combination or agreement which directly or indirectly causes, induces or compels a violation of any of the provisions of this chapter, or inflicts any loss, injury or damage on anyone because of his refusal to violate any of the provisions of this chapter shall be unlawful. (Added by Stats. 1941, ch. 623, §1, p. 2079.)

§1133. Injunctive relief: Recovery of damages. Any person injured or threatened with injury by any violation of any of the provisions of this chapter shall be entitled to injunctive relief therefrom in a proper case, and to recover any damages resulting therefrom in any court having jurisdiction in the State of California. (Added by Stats. 1941, ch. 623, §1, p. 2079.)

§1134. Definitions.

(a) ('Hot Cargo.') As used in this chapter, 'hot cargo' means any combination or agreement resulting in a refusal by employees to handle goods or to perform any services for their employer because of a dispute between some other employer and his employees or a labor organization or any combination or agreement resulting in a refusal by employers to handle

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goods or perform any services for another employer because of an agreement between such other employer and his employees or a labor organization.

(b) ('Secondary Boycott.') As used in this chapter, 'secondary boycott' means any combination or agreement to cease performing, or to cause any employee to cease performing any services for any employer, or to cause any loss or injury to such employer, or to his employees, for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of any other employer because of a dispute between the latter and his employees or a labor organization or any combination or agreement to cease performing, or to cause any employer to cease performing any services for another employer, or to cause any loss or injury to such other employer, or to his employees for the purpose of inducing or compelling such other employer to refrain from doing business with, or handling the products of any other employer, because of an agreement between the latter and his employees or a labor organization.

(c) ('Labor organization.') As used in this chapter, 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(d) ('Employer.') As used in this chapter, the term 'employer' includes any person acting in the interest of an employer, directly or indirectly and any association of employers, including growers and other hirers of labor.

(e) ('Employee.') As used in this chapter, the term 'employee' includes any natural person who works for any person for compensation. (Added by Stats. 1941, ch. 623, §1, p. 2079.)

§1135. Duration of statute. This chapter shall be in effect until May 1, 1943, and thereafter:

(a) During the continuance of the existence of the National emergency declared by the President of the United States to exist, by his proclamation issued under date of September 8, 1939.

(b) During any period of war between the United States of America and any foreign power, legally declared to exist. (Added by Stats. 1941, ch. 623, §1, p. 2080.)

§1136. Invalidity of provision or of application to particular person or circumstance. If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (Added by Stats. 1941, ch. 623, §1, p. 2080.)"

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Statement.

On May 21, 1946, petitioner in interest, Farmer Bros. Co., a corporation, filed a suit in the Superior Court of the State of California in and for the County of Los Angeles [R. 2]. Among the defendants therein and respondents herein were Gay Lillefloren, Russell Marks, L. L. Sylvane, Homer Ford and Irv Magisen, all of whom were alleged to be business agents and representatives of certain labor union defendants [R. 9-11-12]. The allegations of the complaint may be summarized as follows:

Farmer Bros. Co. is a corporation organized under the laws of the State of California, having its principal place of business in Los Angeles, California, and for more than twenty years had been engaged in the business of roasting, packaging, distributing and selling coffee, tea, spices, with restaurant crockery to cafes, restaurants, coffee shops and institutions. The company also engaged in manufacturing and assembling coffee-brewing and coffee-dispensing machinery, stoves and urns. The business was both intra-state and inter-state. The company imported raw coffee from Central and South America, processing it at its plant in Los Angeles and then shipping it for distribution and sale to various points, including branch offices throughout California, Oregon, Nevada, Arizona, Idaho, Texas, Utah and New Mexico [R. 9]. That in connection with the distribution of its products, the company used licensed common carriers, such as steamship companies, railroad companies and trucking concerns [R. 10].

That in the conduct of its business, the company employed approximately three hundred persons; that there was not any labor controversy or disputes between the

company and its employees; that the defendant unions did not represent a majority of the company's employees for collective bargaining purposes, but notwithstanding, the unions and their agents, the respondents herein, demanded that the company sign a closed shop contract.

The company protested that under the Wagner Act they could not do so unless the unions represented a majority of its employees, the company being in interstate commerce and subject to the Wagner Act.

The unions reported:

> "You had better sign this contract because we could picket this place for ten years and we don't think we could get a majority of your employees to join our unions." [R. 15.] [C. R. 19.]

The company refused to sign such a contract in the absence of a showing that the unions represented a majority of its workers for collective bargaining purposes, or an election to determine that question, to be conducted by the N. L. R. B. The unions placed the company on the unfair list and then commenced notifying railroads, steamship companies, common carriers and suppliers of the company that if they did business with the company such concerns would have trouble, that their employees would be called out on strike [Par. XXV, Complaint, R. 20].

As a result, the company had several carloads of coffee, valued in excess of fifty thousand dollars ($50,000.00) kept in San Pedro Harbor, California [Par. XXVI, Complaint, R. 21]. The company was practically stopped from doing business with common carriers [Pars. XXIX, XXX, XXXI of Complaint, R. 22-30].

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The complaint alleges that the defendant unions therein named and others as agents thereof, including the respondents herein, entered into a combination and agreement in violation of the statute herein involved, to carry out the purposes of such agreement and to force Farmer Bros. Co. to execute a closed shop contract [Pars. XXXIV, XXXV, XXXVI, XXXVII, XXXVIII and XXXIX, R. 32-35]. Complaint also contained an allegation that the company had "no plain, speedy or adequate remedy at law," and unless restrained from performing and committing the unlawful acts complained of, the defendants therein would cause irreparable damage and injury to the company [Par. XLI, Complaint, R. 36]. The complaint then alleges a second cause of action, in Paragraphs I, II and III of the second cause of action, and invokes Sections 1131-1136, inclusive, of the Labor Code and alleges it had been damaged in the sum of twenty-five thousand dollars ($25,000.00).

The prayer follows asking for injunctive relief, both temporary and permanent. Affidavits of Ted Ehler, Tony Sinozich and Louis Clemens were filed, and application for a temporary restraining order and order to show cause were made, and on May 22, 1946, the Superior Court of the State of California in and for the County of Los Angeles, upon the complaint and such affidavits, issued a temporary restraining order and order to show cause [R. 54], and thereafter demurrers of various defendants were filed [R. 56-57-69] raising the constitutional questions and extensive memoranda of points and authorities were filed [R. 62].

After issuance of the temporary restraining order, the respondents herein were each duly served with the same

and thereafter a joint affidavit of Ray C. Turnbull, Roy F. Farmer and Rupert B. Turnbull, in support of the company's application for the alleged contempt of Gay Lillefloren, was filed; and subsequently an affidavit of Roy F. Farmer for contempt of Gay Lillefloren and L. L. Sylvane, was filed [R. 81]; and thereafter an affidavit as to Homer Ford, Russell Marks and Irv Magisen, said affidavit being of Roy F. Farmer, was filed [R. 97], and an order to show cause was issued by the Superior Court [R. 95], directing Gay Lillefloren, Homer Ford, Russell Marks and Irv Magisen to appear and show cause why they should not be punished for contempt of court [R. 96].

The charging affidavit for contempt alleged: That after the filing of the complaint by the company, the temporary restraining order had issued, and the complaint was incorporated in its entirety in the charging affidavit, by reference; that the respondents herein had been duly served with the same, and it also alleged that notwithstanding that they had interfered with the General Steamship Corporation, the Indies Terminal Company and the Sheriff of Los Angeles County in the delivery of several hundred sacks of green coffee by the steamship companies, which were alleged to be common carriers, to Farmer Bros. Co., said respondents threatened the common carriers that unless they ceased delivering coffee to the company that the dock "would be tied up."

The respondents herein appeared by demurrer charging that it was a violation of their constitutional rights and violated the Fourteenth Amendment to the Constitution

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[R. 107-118]. Demurrers to the contempt affidavits were overruled and thereafter the contempt matters were set down for trial and tried before the Honorable Jess E. Stephens, Judge Presiding, Department 30 of the Superior Court of the State of California in and for the County of Los Angeles. The trial extended over some days, argument was made to the Court and briefs filed. Thereafter the Court rendered a memorandum opinion. [See Response of Farmer Bros. Co., Objections to Granting Review, R. 169.]

After such opinion by the Court, judgment and warrants of commitment on conviction of contempt of Court were rendered against respondents, Homer Ford [R. 124], against Gay Lillefloren [R. 146], against Russell Marks [R. 131], against Irv Magisen [R. 138], and against Sylvane [R. 156].

Thereafter, petitions were filed with the Supreme Court of California for review. The matters were argued, submitted and decided by the Supreme Court of California as hereinbefore indicated.

Thereafter, a petition was filed by the Superior Court of the State of California in and for the County of Los Angeles and the respondent in interest, Farmer Bros. Co., seeking a rehearing by the Supreme Court of California. This was subsequently denied by the Supreme Court of California (31 A. C. No. 13, Minutes, page 5), Justice Shenk voting for rehearing.

Specification of Errors to Be Urged.

The Supreme Court of California erred:

1. In holding that the so-called "hot cargo and secondary boycott law" was so uncertain that it violated due process of law as protected by the Fourteenth Amendment to the Constitution and that it was unconstitutional for the reason that it abridged the right of free speech as guaranteed by the First Amendment to the Constitution.

2. In refusing to grant relief to the petitioners in interest under the facts set forth in the complaint, the Supreme Court deprived the petitioners in interest of the equal protection of the law and it amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution.

The injunction claimed was good and restrained the commission by the respondents of unlawful acts and, in equity, Farmer Bros. Co., were entitled to the injunction, and its denial by the Supreme Court of California amounts to a denial of equal protection under the law and a denial of due process.

Summary of Argument.

The petitioner in interest, a concern operating in intrastate and interstate commerce throughout California, Oregon, Nevada, Idaho, Utah, Texas and New Mexico, had demands made upon it by labor unions that it sign a "closed shop" contract. This company's representative stated it could not do so until the union represented a majority of its employees for collective bargaining purposes, for the reason they were engaged in interstate commerce and under the Wagner Act could not lawfully make

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such a contract. The company stated it would consent to an election.

The unions placed the company on the "unfair" list, notified railroads, steamship companies, common carriers, suppliers and customers of the company that they could not do business with the company and that if they did their employees would be called out on strike, that they would be "tied up."

The company was unable to obtain shipments by common carrier or ship by common carrier, and many of their suppliers and customers ceased doing business with them.

The company filed a suit in the Superior Court of the State of California, in and for the County of Los Angeles, seeking general equitable relief and an injunction; and in a second cause of action availed itself of the so-called "hot cargo and secondary boycott" law as contained in Sections 1131-1136 of the Labor Code of California.

Upon the filing of the complaint and accompanying affidavits the Court issued an injunction. Demurrers were filed attacking the constitutionality of Sections 1131 to 1136 of the Labor Code of California, and thereafter the respondents, being representatives of the named defendant unions in the suit and having been served with copies of the injunction, pursued a course of conduct interfering with common carriers and others.

Affidavits seeking a contempt citation were filed, an order to show cause issued, and the respondents brought before the Court and tried. They again raised the question of the constitutionality of the so-called "hot cargo and secondary boycott" law, contending it was in violation of the Fourteenth Amendment and of the First Amendment to the Constitution.

The Trial Court convicted them, they were sentenced, and upon review the California Supreme Court reversed their conviction upon the ground that the law invoked was unconstitutional.

It is our contention that the so-called "hot cargo and secondary boycott" law is constitutional; that it was within the power of the people of the State of California in the first instance through the legislature, and ratified by the people in a state-wide referendum, to determine the policy of the state with reference to labor matters and in the general welfare of the state and under police powers to fix the limits within which labor combatants might wage their warfare.

It is our contention that this law does not restrict legitimate picketing. In fact, the injunction itself in this case so stated. This law is aimed at agreements, combinations, conspiracies and understands between employees of various companies doing business with a person involved in a labor dispute by which such employees for the common carriers, customers and suppliers of the company engaged in the dispute, will refuse to perform services for their respective employers for which they are hired and paid, in restraint of trade.

It is our contention that the law was a proper exercise of the legislative function in the public welfare. (See *Carpenters & Joiners Union v. Ritter's Cafe,* 315 U. S. 722, 728.)

We further assert that the California Supreme Court should have invoked the severability clause, and could have done so, in order to save this legislation, that being its obligation under the law so to do.

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ARGUMENT.

Sections 1131-1136 of the Labor Code of California Are Constitutional, Clear, Certain, and Readily Notify a Person of Ordinary Intelligence of the Acts Denounced. It Was a Proper Exercise of the Police Power of the State.

Sections 1131-1136 of the Labor Code of California are plain, certain and readily understood and represent nothing more than the right of the State to protect against abuses of the right of free speech.

The State had a right to impose limits on the concerted action of labor unions, its members and agents, and this Act represented the policy of the people of the State of California in such matters, as indicated by the enactment of the law by the legislature in the first instance, and its subsequent ratification in referendum by the people of the State of California. (*In re Blaney,* 30 Advance California Reports 648, 666.)

The decisions sought to be reversed in this proceeding were based upon the decision by the California Supreme Court in the case of *In re Blaney, supra,* so therefore we must turn to the *Blaney* case for a proper consideration of this review.

The Act under consideration resulted from the numerous statements by the Supreme Court of the State of California to the effect that "with reference to the power that is placed in the hands of a few persons by combinations and organizations on either side, that these are considerations for the law-making power, not for the courts." Citing *C. S. Smith Metropolitan Market Co. v. Lyons,* 16 Cal. 2d 389, 400; *McKay v. Retail Automobile Salesmen's Local Union 1067,* 16 Cal. 2d 311, 331.

At the outset we must assert that this law was not intended to, and we say a fair construction of the law precludes the conclusion that it seeks to prohibit persons from engaging in picketing or from giving publicity to a labor dispute.

The law was enacted to prohibit combinations, agreements and conspiracies to prevent common carriers, suppliers and customers of those who may be engaged in a labor dispute from performing their usual services by combinations, agreements and conspiracies among employees and others to cause the employees of such carriers, suppliers and customers from performing their duties and services for their respective employers, for which they are hired and paid, which such agreements would be in restraint of trade. It is the agreement, concerted activity, and conspiracy that is denounced by the law, and we assert that the people of the State of California had the right to set the policy and to limit the area within which industrial combatants might wage their warfare and to make unlawful conspiracies and agreements as are in the Act defined. Each case before this Court, or any other Court, must rest upon the facts of that case, not upon imaginary conclusions or imaginary sets of circumstances. In this case the complaint itself alleges that the company was in inter-state commerce doing business throughout the West from California to Texas [R. 8]; that the unions did not represent a majority of the employees of the company, if anyone; and the unions recognized they could not get a majority of the employees to join the unions [R. 15]. The company refused to sign a contract claiming they could not do so under the Wagner Act unless the unions represented a majority of their workers, and thereupon the company was placed upon the unfair list by the unions,

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and the unions notified railroads, steamship companies, common carriers, suppliers and customers of the company that if they did business with the company such concerns would have trouble, that their employees would be called out on strike [Par. XXV Complaint, R. 20]. As a result the company had several carloads of coffee valued in excess of $50,000.00 tied up in San Pedro Harbor, California [Par. XXVI Complaint, R. 21]. The company was practically unable to do business with common carriers [Pars. XXIX, XXX, XXXI Complaint, R. 32]. The complaint then alleges that the defendant unions and the agents named therein, including the respondents herein, entered into a combination and agreement, in violation of the statute here involved, to carryout the purposes of such agreement and to force Farmer Bros. Co. to execute a closed shop contract [Pars. XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XXXIX Complaint, R. 32-35].

The complaint further recites that

> "if the suppliers of plaintiff, the buyers and customers of plaintiff, and the common carriers of plaintiff, hereinbefore named, or any one of them, refuse to conform to and abide by the said notifications and threats made by said defendant unions and their representatives and agents, pursuant to said unlawful combination and agreement, defendants and each of them threaten to carry out said threats and threaten to, and by the means described above will, cause the employees of each of said suppliers, buyers, customers and carriers so refusing, to cease performing any services for their respective employers, for the purpose and with the intent of inducing and compelling said respective employers, suppliers, buyers or carriers of plaintiff, to refrain from doing business

with, or supplying products to, or buying products from, or carrying products to or from the plaintiff." [Par. XXXVIII Complaint, R. 34.]

It was further alleged in the complaint that the defendants, pursuant to the unlawful agreement and combination agreed to and did notify certain suppliers, customers and common carriers of the petitioner in interest herein, that if they continued to do business with the petitioner in interest, supply any products to, purchase any products from, pick up, receive, haul or transport freight or merchandise to or from the petitioner in interest's plant, the defendant unions, including the respondents, would cause the employees of said suppliers, customers and buyers of petitioner in interest to cease performing any services for their employers as long as they, their employers, continued to do business with the petitioner in interest, etc. [Par. XXXV Complaint, R. 32].

The complaint is replete with assertions of the activities done to carry out the unlawful conspiracy and agreement and combination which had for its purpose to keep all of the employees of anybody with whom the petitioner in interest did business, from performing any services for their said employers until the petitioner in interest acceded to the demands of the unions and the respondents herein. In other words, they either had to "give in" or they "would be out of business."

In the *Blaney* case, *supra*, the Supreme Court of California declared invalid and inoperative the "separability clause" which is found in the California secondary boycott statute, which the California court characterized as "an unusual form of separability clause." A study of various laws fails to support any such conclusion, for the separa-

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bility clause contained in the statute here under question is very similar to that to be found in numerous Acts of both the Congress and State Legislatures. For instance, see Section 165 of the Wagner Act; see Section 219 of the Fair Labor Standards Act, and Section 608 of the Federal Communications Act of 1934, Title 47, U. S. C. 608, which is as follows:

> "If any provision of this chapter or application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances, shall not be affected thereby."

See:

Buchsbaum Company v. Beaman, D. C. Ill., 14 Fed. Supp. 444;

Opp Cotton Mills v. Adm. of Wage and Hour Div., Dept. of Labor, 111 F. 2d 23, 312 U. S. 126.

In the case of *Williams v. Standard Oil Co. of Louisiana,* 278 U. S. 235, where the Supreme Court had before it the constitutionality of a state statute concerned with fixing prices at which commodities might be sold, services rendered and property used, the validity of a saving clause was discussed, and by reference to that case the similarity of such clause to the one involved here is quite apparent. The Court said:

> "Finally, it is said that even if the price-fixing provisions be held invalid, other provisions of the Act should be upheld as separate and distinct. This contention is emphasized by reference to Section 12 of the Act which declares 'If any section or provision of this Act shall be held to be invalid, this shall not

affect the validity of other sections or provisions hereof.' Citing cases Hill v. Wallace, 259 U. S. 44, 71."

In that case it was said:

"It is said that such a legislative declaration serves to assure the Courts that separate sections or provisions of a partly invalid act may be properly sustained without hesitation or doubt as to whether they would have been adopted even if the legislature had been advised of the invalid part. . . ."

In the case of *Electric Bond and Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, where they were discussing severability of registration provisions of the Public Utility Holding Company Act, the severability clause stated:

"If any provision of this title or application of such provision to any person or circumstance shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

The Court held in effect:

"This provision reverses the assumption of inseparability . . . that the legislature intended the Act to be effective as an entirety or not at all."

It would appear therefrom that it is the opinion of the Supreme Court of the United States that when the validity of an Act or its application is in question, divisibility in order to save the Act or portions thereof, is the guiding principle. Invalid parts and invalid application may be

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struck down and the remainder enforced, depending upon the circumstances.

We think it will be readily conceded that the current National Labor Relations Act is probably one of the most discussed and thoroughly studied legislative enactments by Congress in recent years. May we point out that Section 15, the separability clause of the Act, provides:

> "If any provision of this Act or the application of such provision to any person or circumstance shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby." 29 U. S. Code, Sec. 165.

Which section, of course, is an exact duplicate of the similar section in the Wagner Act. It was intended to and devised to meet a situation such as we have in this case.

While ordinarily the Supreme Court of the United States accepts as conclusive the decision of a state supreme court on the separability of state statute (*Dorchy v. Kansas*, 264 U. S. 286), the decision on the point of separability in this case is inextricably bound up and in fact dependent upon the decision on the constitutionality of the state statute under the Constitution of the United States, and the entire matter is therefore appropriately before this Court for review.

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109;

Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55;

South Utah Mines & Smelters v. Beaver County, 262 U. S. 325, 331; 67 L. Ed. 1004.

In fact, the decision of the State Supreme Court involves three interlocking principles so closely related that it will be necessary to discuss them virtually collectively.

First: The state court, instead of giving the statute a construction which would have upheld its constitutionality, did exactly the opposite.

Second: The Court decided the case, not upon the facts before it, but upon imaginary or conjectural cases or sets of facts which were in no way involved in the case before the Court, or necessary to the decision.

Third: Having found that, as applied to these *imaginary* or *conjectural* cases, the statute was unconstitutional, the California Court went on to say that it could not be applied to *other* facts or circumstances because, in calling upon the Courts to determine in each case whether the statute could be constitutionally applied to the facts before the Court, the statute failed to state a definite criteria of guilt.

In each instance the decision of the state Court was contrary to the decisions of this Court, as will be shown.

The points will be treated separately to the extent possible but excerpts from the decisions of this Court will frequently treat of more than one point in the same quotation.

The Supreme Court of California, in ruling the state statute, together with its separability clause, to be unconstitutional and void, declared in *In re Blaney, supra* (p. 660):

> "By this type of provision, the Legislature has in effect sought to delegate to the courts the task of rewriting the statute, directing them to set forth, in a succession of judicial opinions upholding or annulling

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judgments enforcing the provisions of the act, thus determining in advance the extent to which the Legislature may go in providing regulations in this field. It is an inescapable result that, in the meantime, those individuals who guess correctly will be released by the courts, and those who guess incorrectly will be punished; but that no one, employer, employee, union or any one will know what the law is until, after violation of the statute, and judgment thereon, a higher court is given an opportunity to pass on the question of its validity as applied to the particular 'person or circumstance.'

"Such a theory of judicial construction cannot be supported on either practical or legal grounds, and two well-settled propositions condemn the legislation under review here *in toto:* First, where an entire statute in general terms infringes upon the constitutional right of free speech, it will be stricken down in its entirety; and second, where, by reason of invalidity of *some applications* of a criminal statute it fails to state definite criteria of guilt, the whole constitutes an unconstitutional denial of due process of law." (Emphasis added.)

The doctrine that a Court should construe a statute so as to be constitutional or, conversely, should avoid, if possible, a construction which would render a statute unconstitutional, is so well settled as to require no citation of authorities. However, see *N. L. R. B. v. Jones and Laughlin,* 301 U. S. 1; 81 L. Ed. 893.

In a recent case before this Court exactly the same claim was made to this Court as was made to the California Court, namely, that the statute in question in general terms infringes upon the constitutional right of free

speech. Yet this Court deliberately chose not to give the statute such construction.

In *United States of America v. Congress of Industrial Organizations* (92 L. Ed. 1315), this Court declared that an indictment charging that the CIO and its president, in a regular periodical published with union funds, urged all members of the CIO to vote for a certain candidate for Congress, did not set forth a violation of Section 313 of the Corrupt Practices Act.

This Court said (92 L. Ed. 1324):

> "If Section 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."

And again, this Court said (92 L. Ed. 1326):

> "It is our conclusion that this indictment charges only that the CIO and its president published with union funds a regular periodical for the furtherance of its aims, that President Murray authorized the use of those funds for distribution of this issue in regular course to those accustomed to receive copies of the periodical and that the issue with the statement described at the beginning of this opinion violated Section 313 of the Corrupt Practices Act.
>
> *"We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an 'expenditure in connection with any election' of candidates for federal office intended to outlaw such a publication. We do not think Section 313*

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reaches such a use of corporate or labor organization funds. We express no opinion as to the scope of this section *where different circumstances exist* and none upon the constitutionality of the section." (Emphasis supplied.)

This is directly contrary to the decision of the California Court in the *Blaney* case. Under the doctrine of the *Blaney* case the language of Section 313 of the Corrupt Practices Act *could* have been applied to the publication in question. If, as so applied to those circumstances, the statute was unconstitutional, it could not be applied to *any other circumstances,* for, under the reasoning of the California Court, if it is left to the Court to determine the circumstances to which the statute may be applied and those to which it may not be applied, the statute is void and unconstitutional as failing to provide an ascertainable standard of built.

In *N. L. R. B. v. Jones and Laughlin,* 301 U. S. 1; 81 L. Ed. 893, it was argued that the preamble to the N. L. R. A. and the legislative history of the N. L. R. A. demonstraeed that it was the intent of the legislation to supervise *all* industrial labor relations within the nation in the light of which its scope could not be limited either by construction or by the application of the separability clause. But this Court declared:

"We have repeatedly held that as between two possible interpretations of a statute by one of which it would be unconstitutional, and by the other valid, our plain duty is to adopt that which would save the act. Even to avoid a serious doubt, the rule is the same. (Citations.)

"We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority."

In a companion decision, rendered the same day as the *Jones and Laughlin* decision, this Court said in *Associated Press v. N. L. R. B.* (301 U. S. 103):

"Courts deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances."

In *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 66 L. Ed. 239, this Court said:

"A statute may be invalid as applied to one state of facts and yet valid as applied to another. (Citing cases.)

"Besides a litigant can be heard to question a statute's validity *only when, and so far as it is being or is about to be applied to his disadvantage."* (Citing cases.) (Emphasis supplied.)

One of the decisions referred to in *Dahnke-Walker* opinion is *Yazoo Railroad v. Jackson Vinegar Co.,* 226 U. S. 217. This case involved a statute imposing a penalty of $25.00 on common carriers failing to settle claims within sixty days of notice of loss or damage. The railroad company claimed that the statute was unconstitutional because it imposed a penalty on the carrier irrespective of whether the claim presented to it was reasonable or excessive and regardless of whether or how much the actual recovery fell short of the amount claimed. The Court said:

"But it is not open to the railway company to complain on that score. It has not been penalized for fail-

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ing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which upon due inquiry has been pronounced just in every respect. Of course the argument to sustain the contention is that if the statute embraces cases such as are supposed, it is void as to them, and if so void, is void *in toto. But this court must deal with the case in hand and not with imaginary ones.* It suffices therefore to hold that as applied to cases like the present, the statute is valid. * * *" (Emphasis supplied.)

Again, in *New York ex rel. Hatch v. Reardon,* 204 U. S. 152, this Court said:

"But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the constitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." (Citing cases.)

The statute in question does not violate the Constitution of the United States. The California Court in its opinion recognizes (*In re Blaney, supra,* p. 659):

"That the general presumption of constitutionality fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. *This is possible*

> and proper where the language of the statute *is mechanically severable,* that is, where the valid and invalid parts can be separated by paragraph, clause, phrase, or even single words." (Emphasis supplied.)

The statute is mechanically severable in exactly the manner the California Court indicated.

Turning first to the secondary boycott provisions of the statute, the statute declares:

> "As used in this chapter, 'secondary boycott' means any combination or agreement to cease performing or to cause any employee to cease performing any services for any employer, or to cause any loss or injury to such employer, or to his employees, for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of any other employer because of a dispute between the latter and his employees * * *."

If the California Court had followed its own doctrine and deleted phrases or even single words so that the statute would read:

> "Secondary boycott means any combination or agreement to cease performing * * * any services for any employer * * * for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of, any other employer because of a dispute between the latter and his employees"

the statute would have clearly and explicitly defined a secondary boycott or secondary strike which was clearly within the power of the state to prohibit and which invaded the constitutional right of free speech of no one.

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It is interesting to note that in the *Blaney* case the California Court relied upon its previous decision in the matter of *In re Bell,* 19 Cal. 2d 488. But in the *Bell* case the California Court did exactly what it refused to do in the *Blaney* case. The *Bell* case involved an anti-picketing ordinance, reading in part as follows:

> "Section 3. It is unlawful for any person to beset or picket the premises of another or any approach thereto where any person is employed or seeks employment, or any place or approach thereto where such employee or person seeking employment lodges or resides, for the purpose of inducing such employee or the person seeking employment by means of compulsion, coercion, intimidation, threats, acts of violence or fear, to quit his or her employment, or to refrain from seeking or freely entering into employment."

With reference to this provision, the California Court said:

> "Section 3 of the ordinance likewise makes conduct generally recognized as peaceful picketing unlawful. Peaceful picketing in the course of a labor dispute involves besetting the premises of another for the purpose of inducing employees to quit their employment or dissuading others from seeking employment. The fact that to some extent compulsion, coercion, intimidation, or threats are employed does not detract from its peaceful nature so long as they constitute only economic, moral, or social pressure and not the pressure of violence. (Citations.) The character of the picketing is determined not by the existence of a threat but by what is actually threatened. (Citations.) A picket may point to the possibility of oust-

ing from the union any employee crossing the picket line and thereby compel or coerce him to quit his employment. The provisions of Section 3 prohibiting such conduct are invalid.

"That part of Section 3, however, prohibiting picketing by acts of violence is valid, for there is no constitutional sanction for violence in labor disputes. When part of a statute is declared unconstitutional, the remainder will stand if it is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute. (Citations.) Not only is the valid part of the present ordinance complete in itself, but the ordinance provides: 'If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance.'" (Citations.)

In other words, the California Court struck from the statute the words "compulsion, coercion, intimidation and threats," but, nevertheless, held that the ordinance with only the words, "acts of violence or fear," remaining, was complete, valid and constitutional legislation. If words could be deleted from the ordinance in the *Bell* case to save its constitutionality, it is difficult to see why the same could not have been done in the *Blaney* case in the manner above indicated.

If the State Supreme Court had carried out the provisions of the separability clause of the statute as it applied to persons or circumstances the "hot cargo" provisions of the statute could have been saved as well.

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The statute defines "hot cargo" as follows:

> "As used in this chapter, 'hot cargo' means any combination or agreement resulting in a refusal by employees to handle goods or perform any services for their employer because of a dispute between some other employer and his employees or a labor organization * * *."

Obviously, this provision was intended to apply to a combination or agreement *by the employees themselves* to refuse to handle goods or to perform services for their employer because of a dispute between some other employer and his employees or a labor organization. Let us assume, for the sake of argument, that the statute could not constitutionally be applied to a combination of two or more *other persons* to engage in picketing or to give publicity to a labor dispute which would result in a refusal by employees to perform services for their employer because of a dispute between some other employer and his employees or a labor organization. It could have been applied to a combination or agreement by the employees themselves, for the separability clause specifically provided that:

> "If the application of such provision to any person or circumstance shall be invalid * * *, the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

The California Court held that the statute in question violated the Constitution of the United States in that a particular application of the statute might conceivably

constitute a restraint on free speech. But as this Court has said in the *Dahnke-Walker* case referred to above:

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another."

It is submitted that the statute in question is clearly and readily separable in its application as between: (1) Combinations or agreements by employees themselves to refuse to handle goods or perform any services for their employer; and (2) combinations or agreements by *other* persons resulting in a refusal by employees to handle goods or perform services for their employer. As applied to combinations or agreements of employees themselves, or with others, the statute would not violate the right of free speech guaranteed by the Constitution of the United States, and would have been sufficiently definite to provide an ascertainable standard of guilt.

The California Supreme Court, in refusing to give effect to the separability clause involved in the case at bar, relied upon and quoted from the decision of this Court in *Smith v. Cahoon*, 283 U. S. 553.

That case involved a scheme of regulation applicable to *all* carriers on the public highway. This Court said that the regulations could not be applied to private carriers as well as to public carriers and that the statute was void for uncertainty in that it could not be ascertained to what extent *any* of the regulations were legally applicable to private carriers.

But because it was impossible in that case to ascertain to what extent the regulations were legally applicable to private carriers, it by no means follows that it is impossible in this case, involving a totally different statute, to ascer-

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tain the situations to which this statute could be made legally applicable.

In the case at bar the separability clause would have permitted the Court to hold that the statute was not applicable *at all* to peaceful picketing *per se* or to the mere dissemination of information or other exercise of the right of free speech. In fact, it was the plain duty of the Court so to construe the statute in order to sustain its constitutionality.

The Court could have declared that the statute was intended to be applied only to combinations or agreements by employees themselves or by employees and others, resulting in a refusal by the employees to handle goods or perform services for their employer because of a dispute between some other employer and his employees, or a labor organization.

As so interpreted, the statute would in no way have invaded the constitutional rights of free speech and the statute would have been at least as certain as the language of most anti-trust statutes, or, to choose another illustration, the language of the statute involved in *U. S. v. Petrillo*, 332 U. S. 1. In that case this Court

1. Construed the statute so as to be constitutional rather than unconstitutional;
2. Refused to consider the constitutionality of the statute as applied to a set of circumstances not before the Court;
3. Decided that even though the statute might be unconstitutional as applied to one set of circumstances, it would, nevertheless, be constitutional as applied to other circumstances;

4. Decided that the language of the statute was not so indefinite as to be void for uncertainty.

That case involved a statute making it unlawful "by the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain a licensee—

1. To employ or agree to employ in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services;"

The statute did not mention picketing, peaceful or violent.

It was contended that the statute abridged freedom of speech by making peaceful picketing a crime. In fact, the information charged that Petrillo violated the act "by placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The District Court dismissed the information on the ground that "the *application* of the statute here sought to be made violated the First Amendment by its restriction upon freedom of speech by peaceful picketing." (Emphasis supplied.)

This Court pointed out that the objection raised by respondent was not to the *application* of the statute but to the whole statute itself, saying:

> "Yet the respondent's motion to dismiss was made only on the ground that the statute, as written, contravenes the First Amendment." (P. 9.)

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This Court further pointed out that the trial court rendered its decision on the *application* of the statute.

> "Thus, rather than holding the statute as written to be an unconstitutional violation of the First Amendment, the District Court ruled on the statute as it was proposed to be applied by the information as it then read."

This Court further said:

> "We consider it inappropriate to reach the merits of this constitutional question now. As we have pointed out, we have consistently said that we would refrain from passing on the constitutionality of statutes in advances of the necessity to do so.
>
> * * * * * * * *
>
> "We therefore have a situation in which we are urged to strike down a statute as violative of the constitutional guarantees of free speech when the statute has not been, and might never be, applied in such manner as to raise the question respondent asks us to decide.
>
> * * * * * * * *
>
> "Thus this case had not reached a stage where the decision of a precise constitutional issue was a necessity. Consequently, we refrain from considering any constitutional questions except those concerning the Act as written. We do not decide whether the allegations of the information, whatever shape they might eventually take, would constitute an *application* of the statute in such manner as to contravene the First Amendment. We only pass on the statute on its face; it is not in conflict with the First Amendment." (Emphasis supplied.)

In every respect the decision of the California Court on the constitutionality of the statute in question under the Constitution of the United States is at variance with the decisions of this Court.

It declared the state statute unconstitutional under the right of free speech. In order to do so:

> "It permitted the prior censorship of matters undeniably protected by the constitutional guarantee of free speech."

First: It construed the statute so as to be invalid rather than so as to be constitutional.

Second: It so decided, not upon the facts before it, but upon imaginary cases not before the Court.

Third: It failed to follow the directions of the separability clause by striking out offending language so as to render the statute constitutional.

Fourth: It failed to give effect to the separability clause which provided that if the statute were invalid as applied to certain persons or circumstances it should nevertheless be valid as to other persons or circumstances.

Fifth: It held void for uncertainty language no less certain than that upheld in the decisions of this Court above referred to.

Sections 1131 to 1136 of the Labor Code of California are plain, certain and readily understood and represent nothing more than the right of the state to protect against abuses of the right of free speech.

We earnestly contend that the state had the right to enact this law and to denounce thereunder as unlawful

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certain combinations and agreements which in effect were combinations in restraint of trade. The acts constituted more than just the exercise of free speech under the First Amendment; the acts complained of went far beyond the publicizing of the existence of a labor dispute.

Let us examine the opinion of the Trial Court who made findings which are undisputed in this matter, where the Court said [R. 171-173]:

> "Before discussing that act, however, let us examine the order of the Court and the proven acts of defendants herein, for these are controlling factors, rather than any theories assumed to be applicable thereto. In this connection it must be borne in mind that peaceful picketing must be for a lawful purpose and by lawful means in order to claim such constitutional protection. (James v. Marinship Corp., 25 Cal. (2d) 721.)
>
> "By the terms of the order defendants are 'restrained and commanded to desist and refrain from doing, or attempting to do or causing to be done, by any means, method or device whatsoever, any of the following acts: combining or agreeing to cease performing or to cause any employee of (certain named carriers, suppliers and customers of plaintiff) or any other customer, supplier or carrier of plaintiff to cease performing any services for said employers, or any of them, or causing or agreeing to cause any loss or injury to such employers or any of them, for the purpose of inducing or compelling such employers or any of them to refrain from doing business with plaintiff or furnishing any supplies to plaintiff in its business—or carrying, shipping, or receiving from or delivering to plaintiff any freight or merchandise for plaintiff; or (b) in any way carrying out or effectuating any

such combination or agreement, or in any way giving any notices or making any threats intended or tending to effectuate or carry out any such agreement; (c) provided however, that nothing herein is intended or shall be construed to prohibit peaceful picketing when the same is not done pursuant to or for the purpose of carrying out any combination or agreement herein restrained or enjoined.'

"Now let us consider some of the acts of defendants in the light of this order. Defendants, in combination with each other, and with other persons, caused plaintiff's trucks to be followed to the dock or wharf of the Indies Terminal Co. at the harbor, where a certain shipment of coffee belonging to plaintiff awaited delivery to plaintiff; upon arrival at the dock the person following the truck hurriedly telephoned to defendant Lillefloren; the latter appeared within a few minutes with other men who immediately put on the arm bands of pickets and paraded in front of the door from which the coffee was about to be taken; defendant Lillefloren then notified the superintendent of the Indies Terminal Co. not to deliver said coffee to plaintiff and notified the employees of Indies Terminal Co. not to check out or deliver said coffee to plaintiff; the checker thereupon telephoned to someone for instructions and as a result refused to continue the work of checking; at plaintiff's request the superintendent thereupon indicated his willingness to allow plaintiff's representatives to themselves load the coffee upon its truck, giving their receipt therefor; thereupon defendant Lillefloren threatened that if this were done he would throw a picket line around the entire wharf and keep the picket line in effect 24 hours per day. The superintendent then advised defendant Lillefloren that this coffee belonged to plaintiff, that he had no

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legal right to prevent plaintiff from taking it and that he would be violating his duty if he did so; nevertheless defendant renewed his threat; the superintendent thereupon stated that they had other ships arriving at the wharf, one due within 24 hours, and that he could not risk having their entire business tied up, and for that reason refused to allow plaintiff to take the coffee. Plaintiff's representatives then left with their truck and defendant Lillefloren and his pickets also left. The wharf of the Indies Terminal Co. is 1000 feet long and does a general business of receiving and shipping cargoes in intrastate, interstate and foreign commerce.

"Defendants contend that the eventual purpose of their action was to bring about the unionization of plaintiff's employees—a lawful purpose. But does this make all intermediate purposes lawful? The very cases upon which defendants rely hold to the contrary.

"The immediate purpose of the above actions of defendants was to prevent plaintiffs from obtaining certain specific bags of coffee to which they were legally entitled; and the immediate and sole purpose of the threat to picket and tie up the entire dock of Indies Terminal Co. to refuse to allow plaintiff to take its own coffee to which it was legally and immediately entitled—an unlawful act. Not only was the threat made for that purpose but it succeeded. That it did succeed and that the action of the Indies Terminal Co. in refusing to allow plaintiff to take its own coffee was unlawful is demonstrated by the fact that a few days later by an independent action in this court (the file of which was introduced in evidence herein) the plaintiff received an order of this court for such delivery and pursuant thereto received delivery when accompanied by 12 armed Deputy Sheriffs.

"A similar occurrence took place at the dock of the General Steamship Co. where defendants Lillefloren and Sylvane appeared with their same roving pickets who took their arm bands from their pockets and proceeded to picket so long as plaintiff's representatives were there, prepared to get their coffee and left when the latter left.

"Can anyone say that this was peaceful and lawful picketing? Can it really be said that the above actions, including the successful threat of picketing for the purpose of compelling a neutral to do an unlawful act, were the exercise in good faith of free speech, for the purpose of advising the public of the existence of a labor dispute? Finally, can the picketing or threat of picketing of an entire dock 1000 feet long, where the ships of all nations come and go, thus injuring not only the dock company but large numbers of shippers and consumers having no connection whatever with the dispute, possibly be justified upon the theory of the interdependence of economic interest of all engaged in the same industry?

"That the defendants have a right to engage in peaceful picketing under proper circumstances and for a lawful purpose is so thoroughly established that the citation of authorities would be superfluous.

"But the existence of a right is one thing—its abuse is quite another. The Supreme Court of the United States has said that every case must be determined upon its own circumstances; Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, at 430; Thomas v. Collins, 323 U. S. 516; Schenck v. U. S., 249 U. S. 47, 52; and the great number of cases that have gone to the Supreme Court of the United States as well as to the highest courts of the various states is ample proof of that truism."

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The statute involved here was enacted to reach just such conduct and surely the state had a right to impose limits on the concerted actions of labor unions, its members and agents, and this Act represented the policy of the people of the State of California in such matters, as indicated by the enactment of the law by the legislature in the first instance, and its subsequent ratification in referendum by the people of the State of California. (*In re Blaney,* 30 Advance California Reports 648-666.)

This Act resulted from numerous statements by the Supreme Court of the State of California to the effect that "with reference to the power that is placed in the hands of a few persons by combinations and organizations on either side, that these are considerations for the law-making power not for the courts." (*C. S. Smith Metropolitan Market Co. v. Lyons,* 16 Cal. 2d 389, 400; *McKay v. Retail Automobile Salesmen's Local Union 1067,* 16 Cal. 2d 311, 331.)

It is the unlawful agreement and conspiracy and concerted action that is denounced by this law and the facts recited in the complaint show that the demands made by the union were unlawful; they did not represent a majority of the workers for collective bargaining purposes, and any contract that had been entered into would have been void *ab initio.* The court of equity had nothing to do but to issue an injunction, for the unlawful agreement had as its objective an unlawful purpose. (National Labor Relations Act (29 U. S. C. A. 151 *et seq.*); see *Park & Tilford Import Co. v. International, etc., of Teamsters,* 27 Cal. 2d 599.)

Unlawful demands were made upon common carriers to refuse to perform in accordance with the law and their bounden duty as common carriers. Such a demand was

unlawful. (See California Civil Code, Secs. 2169, 2170; Interstate Commerce Act, Sec. 1(4), 49 U. S. C. A. 1(4); Cal. Const., Art. XII, Sec. 21; Public Utility Act, Sec. 19; Deering, Act 6386, Sec. 19.)

Under the Sherman Law and Clayton Act, prior to the implied amendment thereof in 1932 by the Norris-La-Guardia Act (47 Stat. 70, 29 U. S. C. 101) as interpreted in *United States v. Hutcheson,* 312 U. S. 219, the Supreme Court held that "boycotts through combinations restraining interstate commerce were unlawful acts and subject to civil action as well as being a crime." This was true whether or not the boycott was carried on solely by peaceful persuasions, it was true whether or not the boycott was organized solely by unions and their members. (See *Duplex Printing Co. v. Deering,* 254 U. S. 443, 466, 468, 474, 478; *Bedford Company v. Stone Cutters Assn.,* 274 U. S. 37, 50, 55; *Lawlor v. Loewe,* 235 U. S. 522.)

Even today a boycott carried on by a combination of unions and members violates the Sherman Act. (*Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797.)

The fact that the Supreme Court thus construed and applied the Sherman Act, the repeated decisions over many years as a statute prohibiting secondary boycotts by labor unions, leaves no room for the claim, we submit that a statute so providing is unconstitutional. Even the judges who dissent from the Court's decisions in the cases cited above were careful to say that the matter was strictly one of statutory construction and not of constitutional right. (See *Duplex Printing Co. v. Deering,* 254 U. S. 443, 488.)

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To the same effect is *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 488:

> "Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory constructions, not constitutional power."

See:

> *National Labor Board v. Jones & Laughlin*, 301 U. S. 1, 39-40.

Even as far back as 1908, in *Parkinson Co. v. Bldg. Trades Council*, 154 Cal. 581, the Court upheld the right of labor to conduct a secondary boycott, there being no statute prohibiting it. In the opinion of the Court by Chief Justice Beatty it was said, page 599:

> "Whatever others may think of the policy or justice of such a rule, that is a matter outside the province of the courts, and as with regard to other questions of economic or political aspect, the remedy, if a remedy is needed, must be found by the legislature."

Recent cases in California have not deviated from that rule, or modified those statements—that relief was to be had from the legislature, whose duty it was to protect the public welfare. (See *McKay v. Retail Auto S. L. Union No. 1067*, 16 Cal. 2d 311, 331. See also, *C. S. Smith Met. Market Co. v. Lyons*, 16 Cal. 2d 389, 400.)

The facts recited in the complaint in question were sufficient to bring the present case within the many cases which hold that combinations for unlawful purposes and activities in support thereof, even including peaceful picketing, may be or become actionable or enjoinable and even

in the absence of a statute such action infringes no constitutional action of any kind. (See *James v. Marinship Corp.* (1944), 25 Cal. 2d 721, 728; *Bautista v. Jones* (1945), 25 Cal. 2d 746, 748, 752; *Carpenters & Joiners Union v. Ritter's Cafe* (1942), 315 U. S. 722, 725, 728.)

This is a case where a plain pattern is laid down by the cases dealing with the subject in hand. The cases established that the legislature may make unlawful—as here it has done—concerted action to effect a secondary boycott. The cases hold, without any dissent, that combinations for an unlawful purpose and picketing in support thereof can be prohibited. Admittedly, the public can by statute put some limitation on the scope of labor disputes and can localize them to some extent. In other words, the legislature has the right to define the limits within which the combatants in a labor dispute may conduct their warfare. (See *Carpenters & Joiners Union v. Ritter's Cafe,* 315 U. S. 722, 728. See also *Bakery & Pastry Drivers etc. v. Wohl,* 315 U. S. 769, 775.) "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."

Mr. Justice Shenk, in the dissenting opinion, in the case of *In re Blaney,* 30 A. C. 648, 666, said:

> "This court has repeatedly said, in accord with prevailing judicial opinion elsewhere, that conflicts in labor-management relations can best be controlled, not by the courts but by the Legislature. (Citing cases.)
>
> "Since those decisions were rendered the Legislature has acted, not once but twice in declaring the 'hot

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cargo' and 'secondary boycott' unlawful labor practices and has provided redress by civil action.

"The first act was passed in 1941 (Stats. 1941, p. 2079). The referendum was invoked against it and the effective date of the Act was postponed until its approval by the electors of the state at the general election in November, 1942. During the campaign for and against it the terms of the enactment were extensively discussed, and its meaning and effect were thoroughly understood. That Act contained a provision limiting its effective duration until May 1, 1943, and thereafter during the period of war between the United States and any foreign power.

"The last session of the legislature (Stats. 1947, p. 844, ch. 278) eliminated the emergency provision but without changing the law as enacted in 1941. This was done after extensive discussion and hearings during the legislative session. Now, after the Legislature has twice so acted and the electors of the state have approved the law, this court proceeds to strike it down for reasons which I deem insufficient and not compelled by any constitutional provision or by any decision of the Supreme Court of the United States."

The respondents in this case knew full well what they were doing. They thoroughly understood what they were restrained from doing and the conduct of one of the respondents, at the time of the service of the injunction on him, demonstrated his knowledge of the proceeding, the law, and his utter contempt for the courts, as Mr. Judge Stephens said [R. 174].

In closing on this point, we cannot urge too strenuously that the enactment of this law abridges no right of free

speech, nor does it do violence to due process as guaranteed by the Fourteenth Amendment to the Constitution.

Our every act in daily life is regulated, as properly it should be, for government cannot exist if the citizen may at will use his property to the detriment of his fellows or exercise his freedom contract to work them harm, or to so use his rights of free speech and other liberties guaranteed under the First Amendment as to disrupt the tranquility of the community within which he lives.[1]

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[1]*Nebbia v. New York*, 291 U. S. 502. This case discussed at great length the guarantee of due process and held that it demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the objects sought to be obtained. It further held in effect that in so far as the due process requirement is concerned a state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition, by laws armed against monopolies, or by groups charged with fixing minimum prices. Where a law is not arbitrary or discriminatory the Courts cannot deal with the wisdom of the legislative policy or with the adequacy or practicability of the law enacted to forward it. The constitution does not secure the liberty to conduct a business so as to injure the public at large, or any substantial group. As the Court said (p. 524):

"And Chief Justice Taney said upon the same subject:

'But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States.'

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. * * *"

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II.

The Denial by the Supreme Court of California to the Petitioner, Farmer Bros. Co., the Real Party in Interest, of Relief Under the Facts Set Forth in the Complaint Deprived the Petitioner in Interest of the Equal Protection of the Law and Due Process of Law, in Violation of the Fourteenth Amendment to the Constitution.

Under the facts recited in this case, Farmer Bros. Co., being in interstate commerce, under the National Labor Act as it then existed, could not deal with a union which did not represent a majority of its members for collective bargaining purposes. (29 U. S. C. A. 151 *et seq.; Park & Tilford Import Corp. v. International, etc., of Teamsters,* 27 Cal. 2d 599.)

There can be no doubt but that the demands were for an unlawful purpose. There is no room in this case for the reviewing court (Supreme Court of California) to disregard the cold findings of fact by the trial court and assume that the purposes for which the union conducted its concerted activities was different than that which the evience shows it conclusively to have been.

The hard realities in this case show that this concern employed more than 250 employees and the union had been trying to organize them; that the concern was in interstate commerce; also, the union was unsuccessful. They then made demands that the employer sign a "closed shop contract." [See Pars. XXI, XXII, XXIII, Complaint, R. 14-18.]

The complaint recites facts which demonstrate an unlawful interference with common carriers, and the decision in this case runs counter with the decision filed the same day by the Supreme Court of California in the case of *N. W. Pac. R. R. Co. v. Lumber & S. W. Union,* 31 Advance California Reports, p. 448, where the Court sustained an injunction interfering with a common carrier in the discharge of its bounden duty. To grant relief to the railroad in one breath and to deny it to Farmer Bros. Co. in the next is a plain denial of equal protection of the law. (*Yick Wo v. Hopkins,* 118 U. S. 220.)

Plainly the acts of the union were unlawful in that the demands in the first instance were unlawful—the demand of a "closed shop contract" where they did not represent the majority of the workers. Next, they proceeded with the interference with common carriers in the discharge of a duty which, under the law, they were required to perform.

In these contempt proceedings, Lillefloren and the other agents interfered with the delivery of green coffee by a common carrier. It was a plain effort to put Farmer Bros. Co. out of business if they failed to accede to the unlawful demands of the respondents.

Manifestly, to permit this decision to stand makes the California courts impotent to grant relief. It deprives even a court of equity of the right to restrain unlawful activities.

Conclusion.

Wherefore, the decision below should be reversed and the so-called "hot cargo and secondary boycott law" of California should be held constitutional.

Respectfully submitted,

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